

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Broadcast Localism) MB Docket No. 04-233
)

TO: The Commission

FILED/ACCEPTED
APR 28 2008
Federal Communications Commission
Office of the Secretary

**JOINT COMMENTS OF
CERTAIN STATE BROADCAST ASSOCIATIONS AND INDIVIDUAL BROADCAST LICENSEES**

HARRY F. COLE
JEFFREY J. GEE

Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street – 11th Floor
Arlington, Virginia 22209
(703) 812-0400
cole@fhhlaw.com

Counsel for the Commenters

April 28, 2008

HARRY F. COLE
ANNE GOODWIN CRUMP
VINCENT J. CURTIS, JR.
JOSEPH M. DI SCIPIO
PAUL J. FELDMAN
JEFFREY J. GEE
KEVIN M. GOLDBERG
FRANK R. JAZZO
M. SCOTT JOHNSON
MITCHELL LAZARUS
STEPHEN T. LOVELADY*
SUSAN A. MARSHALL
HARRY C. MARTIN
MICHELLE A. McCLURE*
MATTHEW H. McCORMICK*
FRANCISCO R. MONTERO
PATRICK A. MURCK
LEE G. PETRO*
RAYMOND J. QUIANZON
MICHAEL W. RICHARDS*
JAMES P. RILEY
DAVINA S. SASHKIN
PETER TANNENWALD*
KATHLEEN VICTORY
HOWARD M. WEISS
RONALD P. WHITWORTH

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW
11th FLOOR, 1300 NORTH 17th STREET
ARLINGTON, VIRGINIA 22209

OFFICE: (703) 812-0400
FAX: (703) 812-0486
www.fhhlaw.com

April 28, 2008

RETIRED MEMBERS
RICHARD HILDRETH
GEORGE PETRUTSAS
CONSULTANT FOR INTERNATIONAL AND
INTERGOVERNMENTAL AFFAIRS
SHELDON J. KRYS
U. S. AMBASSADOR (ret.)
OF COUNSEL
ALAN C. CAMPBELL
DONALD J. EVANS
ROBERT M. GURSS*
RICHARD F. SWIFT*
WRITER'S DIRECT
703-812-0483
COLE@FHHLAW.COM

* NOT ADMITTED IN VIRGINIA

BY HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
236 Massachusetts Avenue, N.E. – Suite 110
Washington, D.C. 20002

Attention: The Commission

Re: *In the Matter of Broadcast Localism*, MB Docket No. 04-233

Dear Ms. Dortch:

Submitted herewith on behalf of certain state broadcast associations and individual broadcast licensees are an original and 11 copies of Comments in the above-referenced proceeding. The participating parties are identified in Paragraph 2 to the Comments.

Please associate these Comments with the appropriate docket and forward copies of the Comments to each of the Commissioners.

Thank you for your attention to this matter. Please let me know if you have any questions about this.

Sincerely,


Harry F. Cole

Counsel for the Commenting Parties

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Federal Communications Commission
Office of the Secretary

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HARRY F. COLE
JEFFREY J. GEE

Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street – 11th Floor
Arlington, Virginia 22209
(703) 812-0400
cole@fhhlaw.com

Counsel for the Commenters

April 28, 2008

SUMMARY

The Commenters (who are identified in Paragraph 2, *infra*) represent an extensive cross-section of the broadcasting industry – from high-powered, major market, network-affiliated, commercial television stations to low-powered, community-based, non-commercial radio stations serving extremely small cities and towns; from stand-alone, single-station operators to substantial group owners.

Above all else, the Commenters wish to make one thing clear: they are committed to localism. By “localism”, we mean that process by which each station establishes and maintains its own relationship with its audience – both in the station’s community of license and elsewhere within its service area – in order better to serve that audience with programming responsive to the audience’s needs and interests.

The Commenters are therefore not unsympathetic to the Commission’s goals in this proceeding. But the fact of the matter is that the Commission’s “localism” proposals, although perhaps well-intentioned, are hopelessly and irreparably flawed.

Of course, the notion of standardized, governmentally-mandated measures is, from the get-go, contrary to the essence of “localism”. “Localism” does not lend itself to any one-size-fits-all cookie cutter formula; rather, it is an *attitude* which individually infuses and instructs each broadcaster’s operation differently.

The flaws in the Commission’s proposals range from the conceptual to the practical.

The Commission does not have legislative authority to engage in the regulation of program content as proposed here.

And even if the Commission did have such authority, its proposals are, with very limited exception, merely re-tread versions of rules and policies which the Commission itself has

previously rejected. The Commission has an extensive track record spanning decades – a record about which the Commission seems to be largely ignorant (or possibly in denial) – which establishes conclusively that those rules and policies are neither effective nor necessary. Under those circumstances, re-adoption of those rules and policies would be arbitrary and capricious. *See Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993).

And even if the Commission were nevertheless to adopt its various proposals, those measures will ultimately prove to be administratively problematic and practically counterproductive.

Most of the particular proposals suffer from conceptual flaws that make their implementation and enforcement difficult if not impossible. For example, how does the Commission expect to process and evaluate hyper-detailed reports about the programming of *all* AM, FM and TV broadcasters submitted on a *quarterly* basis? Or how would the Commission even begin to resolve disputes about the composition of advisory boards or their relationship to programming?

Importantly, the more aggressively the Commission pursues its goal of program content regulation, the more it runs afoul of the Constitution.

And finally, by piling onto broadcasters regulatory burden after regulatory burden, the Commission will effectively reduce the level of locally-oriented programming available to the public. That is because the proposed measures will invariably impose very substantial costs on licensee budgets, budgets already strained from the increasingly competitive media environment in which they operate. The new measures will constitute nothing but added expense – and very considerable expense at that – with no corresponding revenue. As a result, affected licensees will almost invariably have to trim existing expenses in order to accommodate the new

Commission-imposed burdens, and the most obvious and immediate target of such trimming will be expensive locally-produced, locally-oriented programming.

So if the Commission ignores its lack of statutory authority, and the obviously arbitrary and capricious nature of its proposals, and their fundamental impracticality, and their unconstitutionality, the Commission and the public will be rewarded, at the end of the day, with *less*, not more, locally-oriented programming.

For the reasons set out in detail in these Comments, the Commenters strongly oppose the adoption of the changes proposed in this proceeding.

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1. The parties (collectively, “the Commenters”) listed in the following paragraph hereby submit their Joint Comments in response to the Report On Broadcast Localism and Notice of Proposed Rulemaking (“*Localism Report/NPRM*”), FCC 07-218, released January 24, 2008, in the above-captioned proceeding.

2. The parties hereto are:

Alabama Broadcasters Association
Alaska Broadcasters Association
Anderson University, Inc.
Arizona Broadcasters Association
Arkansas Broadcasters Association
Blakeney Communications, Inc.
Bott Radio Network
Catamount Broadcasting of Chico-Redding, Inc.
Central Florida Educational Foundation
Christian Broadcasting System, Ltd.
Citrus County Association for Retarded Citizens, Inc.
Communicom Broadcasting
CP Media, LLC
Delmarva Broadcast Service, LLC
Extreme Grace Media, Inc.
Family Stations, Inc.
FM Idaho Co., LLC/Locally Owned Radio, LLC
GHB Broadcasting Corporation
GOCOM Media of Illinois, LLC
Hall Communications, Inc.
Independence Media Holdings, LLC
Lazer Broadcasting Corp
Long Pond Baptist Church
Louisiana Association of Broadcasters
Mattox Broadcasting Inc.
Mid-America Radio Group
Mississippi Association of Broadcasters
Montclair Communications, Inc.
Nebraska Broadcasters Association
New Mexico Broadcasters Association
Puerto Rico Radio Broadcasters Association
Radio Licensing, Inc.
RP Broadcasting
Salem Communications Corporation
San Diego Community College District
Sinclair TeleCable, Inc.

South Central Communications Corporation
State Board of Education, State of Idaho
Taylor University Broadcasting, Inc.
Tennessee Association of Broadcasters
Urban Radio Licenses, LLC
West Virginia Radio Corporation

The parties include 11 state broadcast associations and 31 separate broadcast licensees (including entities which hold multiple licenses through affiliated companies). The listed licensees hold, either directly or through affiliated entities, the licenses of more than 250 separate AM, FM and TV stations, while the aggregate membership of the participating state associations exceeds 1,000 stations.

I. PRELIMINARY STATEMENT

3. The Commenters represent the full spectrum of the broadcast industry – from high-powered, major market, network-affiliated, commercial television stations to low-powered, community-based, non-commercial radio stations serving extremely small cities and towns; from stand-alone, single-station operators to substantial group owners. Above all else, the Commenters wish to make one thing clear: they are committed to localism.

4. By “localism”, we mean that process by which each station establishes and maintains its own relationship with its audience – both in the station’s community of license and elsewhere within its service area – in order better to serve that audience with programming responsive to the audience’s needs and interests. How each broadcaster fosters this relationship varies from broadcaster to broadcaster, from station to station, from community to community, from audience to audience. It is an inherently individual process, which encompasses a near-infinite variety of interactions between station and audience, audience and station. By its very nature “localism” must entail different procedures and responses based upon unique community attributes. Standardized, nation-wide policies are the antithesis of localism. Approaches which

may be perfectly suited for one station in one community may be wholly unworkable, or even counter-productive, for other stations in other communities. “Localism” does not lend itself to any governmentally-imposed, one-size-fits-all cookie cutter formula; rather, it is an *attitude* which individually infuses and instructs each broadcaster’s operation differently.

5. And make no mistake: broadcasters are fully engaged in the localism process, because it is the right thing to do and because it is essential to their ability to survive. If a broadcaster fails to provide responsive programming service to its audience, the audience can and will look elsewhere (whether to other broadcast stations or to the ever-increasing ranks of non-broadcast services which compete for audiences in the 21st Century).¹ A broadcast station without an audience is doomed.

6. The ultimate goal of localism, then, is the presentation of programming responsive to the audience’s needs and interests. To be sure, stations engage in a range of activities through which they interact with the audience and thereby identify those needs and interests. But responsive programming is the end product, the culmination, the *sine qua non* of the localism process.

II. THE LOCALISM PROPOSALS

7. In the *Localism Report/NPRM*, the Commission acknowledges – as it must, given the substantial evidence already in the record – that “some broadcasters devote significant amounts of time and resources to airing ‘programming that is responsive to the needs and

¹ And with respect to 21st Century competition, it bears noting that broadcasting is, by its nature, the only truly *local* medium, as opposed to distant signal delivery systems such as satellite television or radio, or cable television, or the Internet. Faced with increasing levels of such non-local competition, broadcasters are likely to increase their attention to localism in order to compete effectively by using one of their most distinctive attributes.

interests of their communities of license.” *Localism Report/NPRM*, at 2 (footnote omitted).

However, this somewhat begrudging and tepidly favorable reference to “some” broadcasters is then promptly undercut when, citing generally (and anonymously) to “many” commenters, the Commission refers to “serious concerns that broadcasters’ efforts, as a general matter, fall far short from what they should be.” *Id.* at 3. According to the Commission, “many stations do not engage in the necessary public dialogue as to community needs and interests and . . . members of the public are not fully aware of the local issue-responsive programming that their local stations have aired.” *Id.*² From there, the Commission concludes that rule changes may be necessary to “address the deficiencies of many broadcasters in meeting their obligation to serve their local communities.” *Id.* The Commission thus starts from the questionable premise that some industry-wide “deficiencies” in fact exist, an unsupported premise in view of a number of factors

² As indicated in the text above, the Commission’s initial broad claim – that “many other commenters” have raised “concerns” about “broadcasters’ efforts, as a general matter” – is not accompanied by any specific reference to any particular source in the record of this proceeding. By contrast, the claim that “many stations do not engage in the necessary public dialogue” is accompanied by a footnote which refers the reader to, “*e.g.*”, the testimony of Martin Kaplan which appears at Monterey Tr. 63-68. *See Localism Report/NPRM* at n. 2. But Dean Kaplan’s testimony does *not* support the Commission’s assertion. To the contrary, Dean Kaplan’s informational presentation is limited to his critical observations about what he perceives as a shortfall in television news coverage of political campaigns (and, in particular, local political campaigns) in 2002. While he refers to a study which he had conducted, he provides no specific information to the Commission, choosing instead simply to broadly summarize aspects of the study. His testimony is so narrowly directed to one particular type of news story (*i.e.*, campaign coverage) in one particular type of programming (*i.e.*, local television news) in a study covering only one election year and only 122 stations, that it is surprising that the Commission believed it appropriate to cite his testimony in support of *any* general conclusions at all. Dean Kaplan’s testimony does conclude with a series of regulatory steps which in his view need to be taken. His suggested steps encompass far more than just political campaign coverage on television, even though his remarks contain no factual claims other than his brief description of his campaign coverage study, so it cannot be said that his proposed “steps” amount to anything but his own unsupported opinion. Certainly Dean Kaplan’s testimony provides no specific, factual information from which the Commission (or anybody else, for that matter) could legitimately reach any conclusion about the extent to which broadcasters engage in “public dialogue”.

which will be addressed below. The various proposed rule changes, also addressed below, are designed to prod, albeit indirectly, all broadcasters into providing certain “local” programming that the Commission believes desirable.

III. THE NON-EXISTENCE OF STATUTORY AUTHORITY AND THE NON-EXISTENCE OF ANY PROGRAMMING OBLIGATION

8. Before examining the details of the Commission’s proposals, the Commenters believe it essential to address two very basic considerations which the Commission did not itself address in the *Localism Report/NPRM*. First, the Commission does not have the legislative authority to impose any content-based programming mandates on broadcasters. And second, notwithstanding the Commission’s frequent references to some supposed “obligation” to provide certain types of programming, no such obligation has ever been specifically imposed by Congress or the Commission.³ We recognize that articulating these two facts is akin to pointing out the Emperor’s lack of new clothes but, quite frankly, these statements are absolutely and irrefutably true.

9. With respect to the Commission’s statutory authority, the *Localism Report/NPRM* alludes vaguely to the notion that the “concept” of localism “derives from Title III of the Communications Act”, which, we are told, “generally instructs the Commission to regulate broadcasting in the public interest, convenience and necessity.” *Localism Report/NPRM*, at 4.

³ The closest that either Congress or the Commission has come to imposing anything even close to such an obligation arose in the context of the Community Broadcasters Protection Act of 1999, codified as 47 USC §336(f). There Congress provided that Class A television stations broadcast an average of at least three hours a week of locally produced programming. Significantly, the statute does *not* address the content of the programming or by whom it is produced; only the locus of production is specified.

But the referenced statutory language says nothing about regulation of program content.⁴ To the contrary, Section 326 of the Communications Act, 47 U.S.C. §326, expressly *prohibits* the agency from engaging in censorship or otherwise depriving broadcasters of their First Amendment right of free speech. Moreover, to the extremely limited extent that Congress *has* authorized the Commission to engage in any regulation of program content, Congress has been express and explicit in such authorization. *E.g.*, 47 U.S.C. §315 (provision of broadcast time to political candidates); 47 U.S.C. §317 (sponsorship identification announcements); 18 U.S.C. §1464 (prohibition against the broadcast of obscene, indecent or profane matter).

10. In other words, when Congress wants to direct the Commission to engage in program content regulation, it does so with scrupulous clarity. We invite the Commission to identify any provision of the Communications Act which *explicitly* and *expressly* authorizes the Commission to mandate, directly or otherwise, the broadcast of particular types or content of “local” programming. To the best of our knowledge, there is no such authorization.⁵

⁴ Significantly, the broad “public interest” language of Title III is not, in and of itself, a delegation of authority by Congress. As the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) has held, “The FCC cannot act in the ‘public interest’ if the agency does not otherwise have the authority to promulgate the regulations at issue. . . . The FCC must act pursuant to *delegated authority* before any ‘public interest’ inquiry is made. . . .” *Motion Picture Ass’n of America, Inc. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (emphasis in original). Thus, the essential threshold inquiry must be whether the Act contains any specific delegation of authority to impose some “local programming” obligation on broadcasters.

⁵ Chairman Frederick Ford’s remarks, in testimony before the House Subcommittee on Communications on May 16, 1960, support our understanding. According to Chairman Ford, “Thus far Congress has not imposed by law an affirmative programming requirement on broadcast licensees. . . . [R]esponsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee, and . . . the fulfillment of such responsibility requires the free exercise of his independent judgment.” *See Report and Statement of Policy re: Commission En Banc Programing Inquiry*, 44 FCC 2303, 2312 (1960) (“1960 En Banc Programing Report”).

11. We recognize that the Commission also refers to Section 307(b) of the Act, which mandates the fair, efficient and equitable distribution of broadcast spectrum among the several states and communities. *See, e.g., Localism Report/NPRM* at 4. But there again, the cited section says absolutely nothing about *programming*. In fact, the history of Section 307(b) demonstrates that it was intended to assure that, as a *technical* matter, broadcast spectrum would be reasonably distributed throughout the country, and not unduly concentrated in particular areas.⁶ We are aware of no indication anywhere in the statutory history that Congress intended Section 307(b) (or its precursor, Section 9 of the *1927 Act*) to authorize, much less require, the Commission to impose any particular programming-related obligations on broadcast licensees.

⁶ Section 9 of the Federal Radio Act of 1927 (“*1927 Act*”), from which Section 307(b) was derived, contained language essentially identical to Section 307(b). But Section 9 of the *1927 Act* also included an elaborate quota system pursuant to which broadcast channels were to be allocated. The allocation was to be based on geographic zones into which the country was divided – and each zone (or states within each zone) was entitled to certain “quota units” of broadcast facilities depending on, *inter alia*, the population of the zone or state. *See, e.g.,* Federal Radio Act of 1927, Pub. L. No. 69-632, §2, 44 Stat. 1162-63; 1932 FRC Ann. Rep. at 25-27 (available at <http://www.fcc.gov/fcc-bin/assemble?docno=3212051>). The “zone” concept was initially included in Section 307(b), but was amended out of the 1934 Act in May, 1935, because, in the words of then-FCC Chairman Anning S. Prall, the quota system was “very difficult of administration and cannot result in an equality of radio broadcasting service.” *See* Tyler Berry, *Communications by Wire and Radio*, at 134 (1937).

Neither the *1927 Act* nor its successor, the Communications Act of 1934, contained any reference to the concept of “community of license”, much less to any obligation to fashion any particular sort of programming directed to such a “community of license”. In fact, until 1930, once a station had been authorized to operate, it was permitted, *without* prior Commission approval, to change its location (the closest that the *1927 Act* came to the concept of a community of license) to *anywhere* within the state in which it had originally been authorized to operate. *See* General Order No. 28, April 20, 1928, 1928 FRC Annual Report at 44 (available at <http://www.fcc.gov/fcc-bin/assemble?docno=2810261>). That alone indicates that the “fair, equitable and efficient distribution” language of the statute did not reflect any overriding legislative concern for “local” programming. It should also be observed that, in an extended statement on the meaning of the “public interest, convenience and necessity” language of Section 9 of the *1927 Act* – language which was carried forward to the 1934 Act – the Federal Radio Commission made no mention at all of any “localism” consideration. 1928 FRC Ann. Rep., app. F(6) at 166-170 (available at <http://www.fcc.gov/fcc-bin/assemble?docno=2810264>).

12. And as might be expected in those circumstances, the history of the Commission's own regulatory activity is devoid of any regulations specifically and expressly requiring broadcasters to provide any particular types or amounts of "local" programming. Despite the Commission's repeated references to some such programming "obligation", the Commission has never codified that supposed "obligation" in any direct and meaningful way. Even at the highwater mark of regulation in the 1970s, the Commission refrained from attempting to impose any specific and express "local programming" requirement on AM, FM or TV broadcasters.⁷ This seems odd. After all, if broadcasters really were (and are) subject to some fundamental "obligation" to provide certain types and amounts of programming, why would the agency charged with regulation of broadcasting not simply articulate that obligation in a rule for the benefit of all concerned?

13. The Commission answered that question, almost 50 years ago, in its *1960 En Banc Programming Report*. A considerable portion of that document was devoted to discussions of supposed "local programming" obligations – indeed, the *Localism Report/NPRM* is in many respects an echo of the *1960 En Banc Programming Report*. But in 1960, after waxing eloquent for page after page about the importance of that "obligation", the Commission stopped short of imposing any actual programming requirement, opting instead to impose an array of essentially procedural mechanisms by which the Commission hoped to lead broadcasters, *indirectly*, to the agency's goal of local programming. The reason for the Commission's reticence? As the Commission stated in the conclusion of the *1960 En Banc Programming Report*:

By [complying with the various indirect mechanisms adopted by the Commission], the licensee discharges the public interest facet of his business calling *without Government*

⁷ Again, if the Commission can identify any such rule, regulation or policy statement, we invite the Commission to do so.

dictation or supervision and permits the Commission to discharge its responsibility to the public *without invasion of spheres of freedom properly denied to it*.

1960 En Banc Programing Report, 44 FCC at 2316-2317 (emphasis added). The Commission thus recognized and acknowledged that it is barred from engaging in program content regulation (*i.e.*, “Government dictation or supervision” over the “public interest facet” of broadcasting) because such regulation would constitute an “invasion of spheres of freedom properly denied” to the government. Note that the Commission did *not* say that it was choosing as a matter of its discretion not to regulate programming; rather, it said that such activity was “denied” to the government.

14. Nothing has changed in the intervening half century to alter the correctness of the Commission’s judgment in that regard.

15. So we start from the premises that the Commission does *not* have any statutory authority to impose local programming requirements, and consequently the Commission has never before sought to directly impose such requirements.

A. The Commission Has No Authority to Adopt Rules Which Affect Program Content.

16. It is beyond debate that the *Localism Report/NPRM*, and the rules contemplated therein, are intended to effect the regulation of the program content of all broadcasters who would be subject to those rules. It would be disingenuous to claim otherwise.

17. To be sure, the agency’s approach is largely one of indirection and misdirection. Presumably mindful of the statutory and Constitutional limitations which plainly prohibit it from requiring specific types and amounts of programming, the Commission takes the same tack it took in, *e.g.*, the *1960 En Banc Programing Report*, by proposing a range of measures, all of which are designed to impose regulatory pressure to cause the production and broadcast of

certain types of program which the Commission apparently believes desirable, all the while disclaiming any intent to regulate content. Not trusting the experience and judgment of broadcasters to know and serve their communities, the Commission suggests, *inter alia*: creation of government-mandated “advisory boards” to help “inform . . . programming decisions” (*Localism Report/NPRM* at 14); elaborate and onerous reporting requirements (concerning only certain types of Commission-specified programming) (*id.* at, *e.g.*, 23); and governmentally-prescribed minimum percentages of certain types of programming (*id.* at 22). The Commission’s stated goal here is to provide “greater access to locally-responsive programming including, but not limited to, local news and public affairs matter.” *Localism Report/NPRM* at 3.

18. However, as noted above, there is no statutory authority for such regulation of program content. In a similar context, the Commission has claimed that the broad “public interest” mandate (language which can be found at multiple places in the Communications Act) could justify the imposition of program content regulation – and the D.C. Circuit thoroughly *rejected* that claim. *Motion Picture Association of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (“*MPAA*”). The same result pertains here. Unless the Commission can demonstrate some express statutory delegation of authority to regulate program content, its current effort to impose itself into the programming decisions of broadcasters cannot even reach the starting gate. *See id.*

19. This is not to say that the goal of promoting localism is inherently undesirable. To the contrary, as the Commenters emphasized above, they uniformly support localism. But whether or not the agency’s goal is salutary is immaterial⁸, for if the Commission lacks the

⁸ *See, e.g., MPAA*, 309 F.3d at 807. We note that, while the Commenters support localism, they do *not* believe that governmental regulation is necessary or desirable to advance localism. As
(Footnote continued on next page)

statutory authority to take the actions it proposes, that is the end of the matter. Here, as discussed above, the Commission lacks the statutory authority for the rules it proposes in this proceeding and therefore should not – *cannot* – proceed any further.

B. The Proposed Rules Are Arbitrary and Capricious.

20. Even if we were to assume, *arguendo*, that the Commission enjoys the statutory authority to adopt its proposed rules and policies, those rules and policies are plainly arbitrary and capricious in view of the Commission’s decades-long history of attempts to regulate in precisely the same manner. It is, of course, well-established that an administrative agency like the Commission can and does routinely adopt and implement rules and policies on the basis of predictive judgments informed by input from the public and the agency’s own presumed expertise. And even if the ultimate validity of those predictive judgments cannot be conclusively established *ab initio*, the agency’s rules and policies are entitled to considerable deference, largely because of that presumed expertise.

21. But it is also well-established that, where the agency has failed to critically assess, over an extended period of time, the validity *vel non* of its predictive judgments and the success *vel non* of its rules and policies, reliance on them becomes “a bit threadbare.” *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993). And when the Commission has clung to policies which are plainly inconsistent with common sense, common experience and other aspects of the Commission’s own regulatory scheme, such policies have been pronounced arbitrary and capricious by the D.C. Circuit. *Id.*

(Footnote continued from preceding page)

developed in greater detail in these Comments, many of the Commission’s proposals would adversely affect the service provided by broadcasters to their audiences.

22. Under this analysis, the Commission's current localism proposals cannot pass muster. Those proposals are merely re-tread versions of rules and policies which have already proved to be unnecessary and/or ineffective and which the Commission itself has rejected. The Commission's proposal, in 2008, to take steps previously implemented and then abandoned over the course of earlier decades represents the triumph of hope over experience. In view of the very extensive track record available to the Commission – a record about which the Commission seems to be largely ignorant (or possibly in denial) – it is clear that adoption of the current proposals would be the height of arbitrariness and caprice.

23. Since the *Localism Report/NPRM* is completely silent about the Commission's historical efforts to regulate program content, review of those efforts is in order to demonstrate that, with respect to its "current" proposals, the Commission really has been there and done that already.

(i) *Early attempts at program content regulation – 1927-1946*

24. One of the earliest administrative efforts to articulate the FRC's view of the local programming obligations of broadcasters appeared in *Great Lakes Broadcasting Co.*, 1929 FRC Ann. Rpt. at 32 (available at <http://www.fcc.gov/fcc-bin/assemble?docno=291101#0>). There the FRC opined that

[t]he tastes, needs, and desires of all substantial groups among the listening public should be met, in some fair proportion, by a well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports, and news, and matters of interest to all members of the family find a place. . . . [T]here are obvious limitations on the emphasis which can appropriately be placed on any portion of the program. . . . There are differences between communities as to the need for one type [of program service] as against another. The commission does not propose to erect a rigid schedule specifying the hours or minutes that may be devoted to one kind of program or another. What the [FRC] wishes to emphasize is the general character which it believes must be conformed to by a station in order to best serve the public.

Id. at 34. In closing, the FRC noted that it would have occasion to review each licensee's past performance "to determine whether he has met with the standard", even though (as evidenced by the passage quoted above) no specific standard had been announced. *Id.* at 35. This reflects the perennial effort of both the Commission and its predecessor, the FRC, to create the impression that a failure to provide certain types and/or amounts of "local" programming might be fatal to a licensee.

25. But the agencies' actions have consistently belied their words.

26. For example, as early as 1928, the FRC had been confronted with a "deluge of complaints" about a number of radio licensees.⁹ The Commission called on the subject licensees to demonstrate that renewal of their licenses would be in the public interest. In response the Commission heard from one renewal applicant whose performance was described by the FRC as follows:

It is clear that a large part of the [station's] program is distinctly commercial in character, consisting of advertisers' announcements and of direct advertising, including the quoting of prices. An attempt was made to show a very limited amount of educational and community civic service, but the amount of time thus employed is negligible and the evidence of its value to the community is not convincing. Manifestly this station is one which exists chiefly for the purpose of deriving an income from the sale of advertising of a character which must be objectionable to the listening public and without making much, if any, endeavor to render any real service to that public.

1928 FRC Ann. Rep. at 156 (discussing Station WCRW) (available at <http://www.fcc.gov/fcc-bin/assemble?docno=2810264>). Notwithstanding that damning description ("negligible" amount of "educational and community civic service", not "much, if any, endeavor to render real

⁹ The precise basis of the complaints is not clear from the available records, but the complaints appear to have involved primarily the technical quality of the service provided by the stations in question. 1928 FRC Ann. Rep. at 153 (available at <http://www.fcc.gov/fcc-bin/assemble?docno=2810264>).

service” to the public), the station’s license was renewed. This seems to contradict the notion that inadequate attention to “local” needs and interests is inconsistent with the “public interest” service supposedly required of a licensee.

27. The WCRW case was hardly unique. For example, in 1938 Station WTOL, Toledo, originally licensed as a daytime-only station, sought nighttime authorization. The licensee asserted as part of its application that nighttime authority would allow it to broadcast “a great many local events” – opera, local speakers, educational features and the like – which it could not broadcast as a daytime-only station. In this connection the licensee emphasized that the only other Toledo station was a network affiliate (“chain hook-up”), a circumstance which prevented that other station from airing the local materials which the applicant wished to broadcast. The Commission granted the application, WTOL commenced nighttime operation in April, 1939, and in less than eight months WTOL had itself become a network affiliate with dramatically reduced live broadcasts. By 1944 its post-6:00 p.m. programming – *i.e.*, the programming aired in the evening hours that were originally proposed to be used for local programming otherwise unavailable in the market – included only 20 minutes per week of local live sustaining programs: 10 minutes of bowling scores and 10 minutes of sports news. *See Public Service Responsibility of Broadcast Licensees (“Blue Book”)*, Public Notice 95462, released July 2, 1946.

28. The *Blue Book* includes a litany of similar cases. The situation compelled then-Chairman Paul Porter to express frustration at the Commission’s standard operating procedure in language reminiscent of the modern-day concerns expressed by, *inter alia*, Commissioner Copps:

Briefly the facts are these: an applicant seeks a construction permit for a new station and in his application makes the usual representations as to the type of service he proposes.

These representations include specific pledges that time will be made available for civic, educational, agricultural and other public service programs. The station is constructed and begins operations. Subsequently the licensee asks for a three-year renewal and the record clearly shows that he has not fulfilled the promises made to the Commission when he received the original grant. The Commission in the past has, for a variety of reasons, including limitations of staff, automatically renewed these licenses even in cases where there is a vast disparity between promises and performance.

Blue Book at 3.

(ii) *The Blue Book and the 1960 En Banc Programming Report*

29. Sensing that its processes circa 1946 had not theretofore resulted in the hoped-for level of public service programming, the Commission considered how best to address that problem. The Commission concluded that it, as the Congressionally-established licensing agency, had “a responsibility to consider overall program service in its public interest determinations”, *but* “affirmative improvement of program service must be the result primarily of other forces.” *Blue Book* at 54-55. Among the “other forces” the Commission had in mind were “self-regulation” as well as “professional radio critics”, “radio listener councils”, “colleges and universities” and “radio workshops” as among the “other forces” which could lead to improvement. According to the Commission, with such groups “rather than with the Commission rests much of the hope for improved broadcasting quality.” *Blue Book* at 55.

30. For its part, the Commission elected “to continue substantially unchanged its present basic licensing procedures.” *Blue Book* at 56. However, the Commission did decide to introduce, gradually, a number of “procedural changes” to improve its ability to assess program performance as set out in applications. *Id.* Those procedural changes included: (a) “uniform definitions” to be used in the maintenance of program logs; (b) annual programming reporting by all licensees; (c) revised application forms to elicit responses more “closely integrated” with Commission policies on program service. With all that new and consistent information, the

Commission concluded that it would be better able to assess renewal applications. *Blue Book* at 56-59.

31. Does any of that sound familiar? It should, because the proposals under consideration in the instant proceeding are eerily similar to those announced in 1946, in the *Blue Book*.

32. Fourteen years after the *Blue Book*, the Commission had yet another occasion to consider the programming “obligations” of broadcasters, including whether the agency’s statutory authority with respect to programming and program practices was “adequate”. *1960 En Banc Programing Report*, 44 FCC at 2306. The Commission there repeatedly acknowledged that its authority to regulate programming in any way was exceedingly limited by Constitutional and statutory limitations. Although it cited no specific need for any change to its established approach, the Commission announced, in the *1960 En Banc Programing Report*, two changes: first, it would revise Part IV of its broadcast application forms to require a statement by the applicant of (1) the measures taken and the effort made “to determine the tastes, needs and desires of his community or service area, and (2) the manner in which he proposes to meet those needs and desires”, *1960 En Banc Programing Report*, 44 FCC at 2316; and second, it would consider revising the “form and content of reports on broadcast programming”, *id.* at 2317.

33. Again, does this sound familiar? It should, because it again mirrors the enhanced reporting requirements which the Commission is proposing now to re-impose. In 1960, apparently concerned about some possible shortfall of some sort in programming responsive to local “tastes, needs and interests”, the Commission acted *not* to specify the types and amounts of programming it might prefer. Instead, the Commission purported to leave such questions to the discretion of the broadcaster. But at the same time the Commission ratcheted up its reporting

requirements, imposing on broadcasters increasingly burdensome chores ostensibly designed to provide the Commission with additional information that might be used in making the requisite public interest findings relative to grant *vel non* of applications.¹⁰ Just like the Commission is proposing in the *Localism Report/NPRM* and its companion “enhanced disclosure” proceeding. *See Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, FCC 07-205, released January 24, 2008 (“*Enhanced Disclosure Order*”).

34. The Commission’s approach was not (and still is not) especially subtle. Despite its extensive protestations of concern about Constitutional and statutory limits, the Commission clearly believed that certain types of programming should be promoted, so the Commission sought to induce delivery of such programming through indirect means. Of course, the Commission repeatedly disclaimed any interest (not to mention authority) to interfere with programming decisions – **BUT** the Commission also happened to control the continued vitality of each broadcaster’s license, and in order to assure that continued vitality through the renewal process, broadcasters would have to satisfy the Commission that renewal would be in the public interest, and the Commission made clear what it thought the public interest would require.

¹⁰ The Commission was not shy about raising its regulatory eyebrow so as to signal to broadcasters just what the FCC might want to see in the more detailed reports they would be required to file. The Commission helpfully listed the “major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located as developed by the industry, and recognized by the Commission.” *Id.* at 2314. Those “major elements”, as identified by the Commission, were: (1) opportunity for local self-expression; (2) the development and use of local talent; (3) programs for children; (4) religious programs; (5) educational programs; (6) public affairs programs; (7) editorialization by licensees; (8) political broadcasts; (9) agricultural programs; (10) news programs; (11) weather and market reports; (12) sports programs; (13) service to minority groups; and (14) entertainment programs. *1960 En Banc Programing Report, supra* at 2314.

35. Adding further pressure on the licensee to conform, the Commission adopted internal processing guidelines which mandated that applications proposing less than certain specified amounts ¹¹ of nonentertainment (*i.e.*, news, public affairs and “other” nonentertainment programming) could **not** be routinely processed by the then-Broadcast Bureau, but would instead have to be referred to the full Commission for its consideration. Again, the message was unmistakable: the Commission expected licensees to provide certain amounts of “good” programming, and while the Commission could not mandate that each broadcaster air such amounts, the Commission could set its application processing procedures up in a way which both signaled what those amounts were **and** provided a clear incentive (*i.e.*, avoidance of delay and complication attendant to full Commission review) to provide those amounts.

36. We ask again, does this sound familiar? And the answer, again, is that it should, because the Commission is now proposing a return to this “processing guidelines” approach. See *Localism Report/NPRM* at 56.

37. As noted above, in the *1960 En Banc Programming Report* the Commission indicated that it would revise Part IV of some of its application forms to require considerably more detail relative to the applicant’s efforts to identify and meet local community needs and interests. The revisions, however, gave rise to considerable uncertainty and inconsistency, which led the Federal Communications Bar Association to request clarification of the application reporting requirements. That, in turn, led to the adoption of the *Primer on Ascertainment of Community Problems by Broadcast Applicants, Part I, Sections IV-A and IV-B of FCC Forms*, 27 FCC2d 650 (1971) (“*Ascertainment Primer*”). The *Ascertainment Primer* was a

¹¹ The specified minimum (set out in Section 0.281 of the Commission’s rules) varied depending on the station’s service: AM stations were subject to an 8% minimum; FM’s to a 6% minimum; TV’s to a 10% minimum. See, *e.g.*, *Deregulation of Radio*, 84 FCC2d 968, 975 (1981).

micromanager's delight, providing broadcasters with extraordinarily detailed directions for how they should interact with their communities. And not only did the Commission require that broadcast applicants jump through all the hoops described in the *Ascertainment Primer*, but the Commission also required that each applicant report, in detail, on precisely how it had jumped through all those hoops.

38. It will come as no surprise that, in the *Localism Report/NPRM*, the Commission suggests that ascertainment obligations should be re-imposed, with the *Ascertainment Primer* serving as a "starting point". *Localism Report/NPRM* at 14.

39. Thus, the new rules and policies which are proposed in the *Localism Report/NPRM* have, for the most part, *already* been implemented, historically, by the Commission. As a result, the Commission has a track record by which it can gauge the likelihood of success of those rules and policies.

40. That record demonstrates that the various regulatory mechanisms are not effective.

41. On the one hand, the good news is that, to the best of our knowledge, no station has ever been denied a license based solely on a lack of informational or educational programming.¹² This might be viewed as an indication that the Commission's mechanisms were completely effective, thereby prodding all broadcasters to meet the minimum amounts of particular types of nonentertainment programming indirectly prescribed by the Commission.

42. But upon further inspection, it appears that that view is inaccurate. In detailed dissenting opinions issued in a series of cases from 1967-1973, Commissioners Johnson and/or

¹² Proving conclusively that there have been no such instances at all is a largely impossible chore. Our belief that there have been no such denials is bolstered in Ramey, *Mass Media Unleashed* (2007) at 198, reviewed by Henry Geller in 60 FCLJ 391, 392 (2008).